

COMPUTATION OF OVERTIME PAY

§ 548.500 Methods of computation.

The methods of computing overtime pay on the basic rates for piece workers, hourly rated employees, and salaried employees are the same as the methods of computing overtime pay at the regular rate.

Example 1. Under an employment agreement the basic rate to be used in computing overtime compensation for a piece worker for hours of work in excess of 8 in each day is the employee's average hourly earnings for all work performed during that day.²³ The employee is entitled to one-half the basic rate for each daily overtime hour in addition to the total piece work earnings for the day.

Example 2. An employee, who normally would come within the forty hour provision of section 7(a) of the Act, has a basic rate which is his monthly salary divided by the number of regular hours of work in the month.²⁴ If the salary is intended to cover straight-time compensation for a forty hour week he would be entitled to overtime for every hour after forty computed on the basis of one and one-half times the established basic rate, in addition to his monthly salary. If the salary is intended to cover a workweek shorter than forty hours, such as thirty-five hours, he would be entitled to additional straight time at the basic rate for the hours between thirty-five and forty and also to overtime at one and one-half time that rate for all hours worked in excess of forty in a week.

[20 FR 5683, Aug. 6, 1955, as amended at 26 FR 7732, Aug. 18, 1961]

§ 548.501 Overtime hours based on nonstatutory standards.

Many employees are paid daily overtime pay or Saturday overtime pay or overtime pay on a basis other than the statutory standard of overtime pay required by section 7(a) of the Act. In these cases, the number of hours for which an employee is paid at least one and one-half times an established basic rate must equal or exceed the number of hours worked in excess of the applicable number of hours established in section 7(a) of the Act in the workweek. However, only overtime hours under the employment agreement which also qualify as overtime hours

under section 7(e) (5), (6), or (7) of the Act²⁵ may be offset against the hours of work in excess of the applicable number of hours established in section 7(a) of the Act.

[26 FR 7732, Aug. 18, 1961]

§ 548.502 Other payments.

Extra overtime compensation must be separately computed and paid on payments such as bonuses or shift differentials which are not included in the computation of the established basic rate and which would have been included in the regular rate of pay.²⁶

Example 1. An employee is paid on an hourly rate basis plus a production bonus, and also a shift differential of 10 cents for each hour worked on the second shift. The authorized basic rate under the agreement is the employee's daily average hourly earnings, and under the employment agreement he is paid one and one-half times the basic rate for all hours worked in excess of 8 each day. Suppose his production bonus is included in the computation of the basic rate, but the shift differential is not. In addition to overtime compensation computed at the basic rate the employee must be paid an extra 5 cents for each overtime hour worked on the second shift.

Example 2. A piece worker, under his employment agreement, is paid overtime compensation for daily overtime and for hours of work on Saturday based on an authorized basic rate obtained by averaging his piece work earnings for the half-month. In addition, he is paid a monthly cost-of-living bonus which is not included in the computation of the basic rate. It will be necessary for the employer to compute and pay overtime compensation separately on the bonus.²⁷

[20 FR 5683, Aug. 6, 1955]

PART 549—REQUIREMENTS OF A “BONA FIDE PROFIT-SHARING PLAN OR TRUST”

Sec.

549.0 Scope and effect of regulations.

549.1 Essential requirements for qualifications.

²⁵ See §§ 778.201 through 778.207 of this chapter.

²⁶ Unless specifically excluded by agreement or understanding and prior authorization is obtained from the Administrator. See § 548.400(b).

²⁷ See § 778.209 of this chapter for an explanation of how to compute overtime on the bonus.

²³ See § 548.302.

²⁴ See § 548.301.

§ 549.0

549.2 Disqualifying provisions.

549.3 Distinction between plan and trust.

549.4 Petition for amendment of regulations.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

SOURCE: 18 FR 3292, June 10, 1953, unless otherwise noted.

§ 549.0 Scope and effect of regulations.

(a) The regulations in this part set forth the requirements of a "bona fide profit-sharing plan or trust" under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (hereinafter called the Act). In determining the total remuneration for employment which section 7(e) of the Act requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide profit-sharing plan or trust meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) The inclusion or exclusion from the regular rate of contributions made by an employer pursuant to any plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees (regardless of whether the plan or trust is financed out of profits) is governed by section 7(e)(4) of the Act, the requirements of which are set forth in the Interpretative Bulletin on Overtime Compensation, part 778, of this chapter, §§ 778.214 and 778.215. However, where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the regulations in this part and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in the Interpretative Bulletin, part 778, of this chapter, §§ 778.214 and 778.215.

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§ 549.1 Essential requirements for qualifications.

(a) A bona fide profit-sharing plan or trust for purposes of section 7(e)(3)(b) of the Act is required to meet all of the standards set forth in paragraphs (b) through (g) of this section and must not contain any of the disqualifying provisions set forth in § 549.2.

(b) The profit-sharing plan or trust constitutes a definite program or arrangement in writing, communicated or made available to the employees, which is established and maintained in good faith for the purpose of distributing to the employees a share of profits as additional remuneration over and above the wages or salaries paid to employees which wages or salaries are not dependent upon or influenced by the existence of such profit-sharing plan or trust or the amount of the payments made pursuant thereto.

(c) All contributions or allocations by the employer to the fund or trust to be distributed to the employees are:

(1) Derived solely from profits of the employer's business enterprise, establishment or plant as a whole, or an established branch or division of the business or enterprise which is recognized as such for general business purposes and for which profits are separately and regularly calculated in accordance with accepted accounting practice; and

(2) Made periodically, but not more frequently than is customary or consonant with accepted accounting practice to make periodic determinations of profit.

(d) Eligibility to share in profits extends:

(1) At least to all employees who are subject to the minimum wage and overtime provisions of the Act, or to all such employees in an established part of the employer's business as described in paragraph (c) of this section: *Provided, however,* That such eligibility may be determined by factors such as length of service or minimum schedule of hours or days of work which are specified in the plan or trust, and further, that eligibility need not extend to officers of the employer; or

(2) To such classifications of employees as the employer may designate with the approval of the Administrator

upon a finding, after notice to interested persons, including employee representatives, and an opportunity to present their views either orally or in writing, that it is in accord with the meaning and intent of the provisions of section 7(e)(3)(b) of the Act and this part. The Administrator may give such notice by requiring the employer to post a notice approved by the Administrator for a specified period in a place or places where notices to employees are customarily posted or at such other place or places designated by the Administrator, or he may require notice to be given in such other manner as he deems appropriate.

(e) The amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more or more of such factors as straight-time earnings, total earnings, base rate of pay of the employee, straight-time hours or total hours worked by employees, or length of service, or distribution may be made on a per capita basis.

(f) An employee's total share determined in accordance with paragraph (e) of this section may not be diminished because of any other remuneration received by him.

(g) Provision is made either for payment to the individual employees of their respective shares of profits within a reasonable period after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares after a stated period of time or upon the occurrence of appropriate contingencies specified in the plan or trust: *Provided, however*, That the right of an employee to receive his share is not made dependent upon his continuing in the employ of the employer after the period for which the determination of profits has been made.

(Approved by the Office of Management and Budget under control number 1215-0122)

[18 FR 3292, June 10, 1953, as amended at 47 FR 145, Jan. 5, 1982]

§ 549.2 Disqualifying provisions.

No plan or trust which contains any one of the following provisions shall be deemed to meet the requirements of a bona fide profit-sharing plan or trust under section 7(e)(3)(b) of the Act:

(a) If the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency;

(b) If the amount to be paid periodically by the employer into the fund or trust to be distributed to the employees is a fixed sum;

(c) If periodic payments of minimum amounts to the employees are guaranteed by the employer;

(d) If any individual employee's share, by the terms of the plan or trust, is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum, or is limited to or set at a predetermined specified rate per hour or other unit of work or worktime;

(e) If the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost.

§ 549.3 Distinction between plan and trust.

As used in this part:

(a) *Profit-sharing plan* means any such program or arrangement as qualifies hereunder which provides for the distribution by the employer to his employees of their respective shares of profits;

(b) *Profit-sharing trust* means any such program or arrangement as qualifies under this part which provides for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares.

§ 549.4 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations in this part may submit in writing to the Administrator a petition setting forth the changes desired and the

reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations in this part is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views in support of or in opposition to the proposed changes.

PART 550—DEFINING AND DELIMITING THE TERM “TALENT FEES”

Sec.

550.1 “Talent fees” as used in section 7(e)(3)(c) of the Fair Labor Standards Act, as amended.

550.2 Definitions.

550.3 Petition for amendment of regulations.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

§ 550.1 “Talent fees” as used in section 7(e)(3)(c) of the Fair Labor Standards Act, as amended.

The term *talent fees* in section 7(e)(3)(c) of the Act shall mean extra payments made to performers, including announcers on radio and television programs, where the payment is made:

(a) To an employee having regular duties as a staff performer (including announcers), as an extra payment for services as a performer on a particular commercial program or a particular series of commercial programs (including commercial spot announcements) or for special services as a performer on a particular sustaining program or a particular series of sustaining programs;

(b) In pursuance of an applicable employment agreement or understanding or an applicable collective bargaining agreement in a specific amount agreed upon in advance of the performance of the services or special services for which the extra payment is made: *Provided, however*, That where services described in paragraph (a) of this section are performed on a program falling outside of the regular workday or workweek as established and scheduled in good faith in accordance with the provisions of the applicable employment agreement, the Administrator will not regard the Act as requiring ad-

ditional compensation as a result of the time worked on the program if the parties agree in advance of such program that a special payment made therefor shall include any increased statutory compensation attributable to the additional worktime thereon and if such special payment, when made, is actually sufficient in amount to include the statutory straight time and overtime compensation (computed without regard to talent fees) for the additional time worked in the workweek resulting from the performer's services on such program.

[15 FR 402, Jan. 25, 1950, as amended at 18 FR 5069, Aug. 25, 1953]

§ 550.2 Definitions.

As used in the regulations in this part:

(a) The term *extra payment* shall mean a payment, in a specific amount, made in addition to the straight-time and overtime compensation which would be due the performer under the agreement applicable to his employment and under the Act if the time spent in performing the services or special services referred to in paragraph (a) of § 550.1 had been devoted exclusively to duties as a staff performer; but shall not include any payment any part of which is credited or offset against any remuneration otherwise payable to the performer under any contract or statutory provision;

(b) The term *performer* shall mean a person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as